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No. 89-1130

In the Supreme Court of the United States

OCTOBER TERM, 1989

JERRY RUSSELL, JR., PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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11 pp

QUESTION PRESENTED

Whether the courts below correctly declined to hold the Secretary of Health and Human Services in contempt of court for failing to pay additional attorneys fees to the deceased petitioner's attorney.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-21) is reported at 887 F.2d 170. The order of the district court (Pet. App. 22-23) is not yet reported.

JURISDICTION

The decision of the court of appeals was entered on October 12, 1989. A petition for rehearing was denied on November 21, 1989 (Pet. App. 24). The petition for a writ of certiorari was filed on January

16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 406(a) of Title 42, provides in pertinent part:

> Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall * * * certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.

STATEMENT

Petitioner Russell filed this action in January 1984 seeking review of the Secretary's final decision terminating his disability benefits under the Social Security Act. Gov't C.A. Br. 2. On the Secretary's motion, the district court remanded the case to the agency for reconsideration pursuant to Section 2(d) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1797. The Secretary reinstated petitioner's benefits on remand. The district court then dismissed the case. Peti-

tioner received all benefits due him, and died some time before September 19, 1988. Pet. App. 15-16; Pet. 3-4.

Anthony Bartels served as counsel to petitioner in the proceedings challenging the termination of petitioner's disability benefits. For his work in the district court, he received an attorney fee (and costs) of $1,688.66 pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. 14; Pet. 3.[1] Thereafter, Bartels applied to the Secretary under 42 U.S.C. 406(a) for an additional attorney fee for work performed at the administrative level of the proceeding. On September 19, 1988, the Secretary awarded $3,000 for this work. Pet. App. 15; Pet. 3-4. The Secretary's notice of the fee award advised Bartels that the Secretary had already released all past-due benefits to petitioner, who was then deceased, and advised Bartels to seek payment from petitioner's estate. Pet. 4.[2]

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[1] Bartels also sought an additional fee for his district court work under 42 U.S.C. 406(b)(1), but the district court denied that request because Bartels had already received an EAJA fee award. Pet. App. 14.

[2] The provision under which Bartels received the administrative level fee award, 42 U.S.C. 406(a), provides that the fee authorized is to be paid out of any past-due benefits. The Secretary may, . . . some circumstances, also pay an attorney fee by offsetting the payment against future benefits. See 20 C.F.R. 404.501(a). Because petitioner was dead by the time the fee was authorized, there were no benefits due from which an offset could be made. In any event, since there was no suggestion that petitioner was at fault, the Secretary's recovery of the fee award from petitioner's estate might well be "against equity and good conscience," and thus barred by 42 U.S.C. 404(b). See Pet. App. 18-19.

Bartels then moved to hold the Secretary in contempt for failing to pay him the attorney fee awarded at the administrative level, asserting that the Secretary, not Bartels, should attempt to obtain payment from petitioner's estate. The motion was referred to a federal magistrate, who recommended that it be denied. The district court adopted the magistrate's recommendation and denied the motion. Pet. App. 22-23. The court of appeals affirmed, agreeing with the district court that (1) the courts lacked jurisdiction to hold the Secretary in contempt because no court order was violated, and (2) there was, in any event, no remedy available because sovereign immunity prevented the court from creating a new charge against the Social Security general fund. *Id.* at 13-21.

ARGUMENT

This petition, filed in the name of a Social Security claimant who died more than a year before the petition was filed, asks this Court to review the refusal of the courts below to hold the Secretary in contempt (1) for paying the claimant his full past-due benefits without withholding up to twenty-five percent of that amount to pay his attorney a fee of $3,000, in addition to the $1,688 which the attorney has already been paid, and (2) for not paying the attorney from the general Social Security trust fund and attempting to recoup the $3,000 from the claimant's estate. Pet. 12.

1. There is no proper petitioning party in this case. Russell, the named petitioner, died more than a year before the petition was filed. There is no suggestion that the petition is filed on behalf of petitioner's estate, or, indeed, any claim that any sums are due either petitioner or his estate. In fact, attorney

Bartels, who filed the petition, could hardly be considered to be a "representative" of petitioner's estate, since, in contending that the Secretary is required to pay him his fee and then recoup that sum from the estate, Bartels is asserting a claim antithetical to the interests of the estate. Cf. Rule 35 of the Rules of this Court (providing for abatement where a private petitioner dies *after* filing a petition for certiorari, and no representative of the deceased moves to be substituted as a party petitioner within six months of the date of death).

We are aware of no case that suggests that a petitioner's attorney is a proper party to proceedings in this Court, still less that an attorney is entitled to petition this Court, in his former client's name, for review of issues resolved below in that client's favor. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 69-71 (1986).[3] In any event, the issues presented in the petition are so evidently without merit that no further review is appropriate in this case.

2. Violation of a court order is a prerequisite for a finding of civil contempt. *Hicks* v. *Feiock*, 485 U.S. 624 (1988); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 (1987); *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949). Bartels admits that he failed to obtain a court order directing the Secretary to pay any attorney fee for work at the administrative level. Pet. 4. Thus, the holding of both courts below is obviously correct.[4]

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[3] This is not the first time that attorney Bartels has petitioned in the name of a former client to seek review of claims decided below in favor of that client. See *Trekas* v. *Sullivan*, 110 S. Ct. 80 (1989).

[4] Furthermore, the court of appeals found insufficient evidence in the record even to conclude that petitioner's past-due

3. In any event, the court of appeals correctly concluded that "there is no waiver of immunity that allows the Secretary to pay this fee." Pet. App. 19. The fee statute (42 U.S.C. 406(a)) provides for payment "out of * * * past-due benefits." All benefits due Russell have been paid. Therefore, any order requiring the Secretary to pay Bartels' fee would require payment out of the general Social Security trust fund. Congress has not waived sovereign immunity to permit that result. Cf. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).[5]

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benefits had been released to him prematurely (Pet. App. 19 n.3). The relevant Social Security regulations (20 C.F.R. 404.1730(c)) provide for the mailing of notice to the attorney if no fee request is received within 60 days of an award of benefits to a claimant; unless a request for attorneys fees for work performed at the agency level is received within 20 days of the mailing of that notice or any extensions that may be granted, "the collection of any approved fee is a matter between the attorney and the claimant represented." 20 C.F.R. 404.1730(c)(2)(ii). Benefit payments to petitioner were resumed in June 1985, and the Secretary did not release the reserved portion of the back benefits until January 1987. Pet. App. 19 n.3; see Russell's Attorney Fee Case--Past Due Benefit Summary, Form SSA-1129 U3 (11-78). Bartels did not apply for a Section 406(a) fee award until May 1988. The magistrate noted that "[t]he record indicates there was a considerable period of time between the award of benefits to the plaintiff and this attorney's submission of his fee petition." Magistrate's Proposed Findings and Recommendations, Mar. 27, 1989, at 4.

[5] The petition also argues (Pet. 9) that *Gowen* v. *Bowen*, 855 F.2d 613 (8th Cir. 1988), should be retroactively applied to this case. *Gowen*, however, is irrelevant here. The Eighth Circuit held in *Gowen* that interim benefit awards to claimants must be included in calculating the twenty-five percent of past-due benefits available to pay attorney fees. Here, there is no dispute over the method by which the fee award was calculated; the issue instead is whether the Secretary can

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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pay any amount to an attorney when there are no past-due benefits.

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